IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EDILBERTO MARTINEZ-CARDENAS, Appellant.	)	No. 59904-6-I DIVISION ONE UNPUBLISHED OPINION FILED: August 24, 2009

AGID, J.—Edilberto Martinez-Cardenas appeals his convictions for three counts of vehicular homicide. He contends that the State's prosecution of him 13 years after filing the charges violated his right to a speedy trial under the Sixth Amendment and CrR 3.3 and was barred by the statute of limitations. He further asserts that the statute of limitations barred the State from amending the charges to add allegations under an alternate prong of the vehicular homicide statute. Because the current criminal rules do not impose any specific time limitations on when an out-of-custody defendant must first appear before the court and there is no factual record from which we can evaluate Cardenas' Sixth Amendment claim, he fails to demonstrate a violation of his speedy trial rights. And because the prosecution commenced when the original charges were filed in 1993 and the amended charges relate back to that transaction, the amendment

was not barred by the statute of limitations. Accordingly, we affirm.

FACTS

On November 21, 1993, Cardenas and three friends were driving from White Center to downtown Seattle when they crashed on the First Avenue South Bridge. Cardenas crossed into the oncoming lane of traffic and hit a pickup truck coming toward him. All three passengers died.

Cardenas was transported to Harborview Medical Center where he admitted to a Seattle police officer that he was driving the car. A blood draw taken from Cardenas within two hours of the crash was tested and found to have a blood alcohol content of .12g/100 ml, which was above the legal limit. A detective also visited Cardenas at the hospital the afternoon of the crash and advised him of his constitutional rights. Cardenas gave him a verbal and written statement admitting that he had been drinking before driving his friends home. He remembered losing control on the bridge and crashing, but thought he was rear-ended.

Three days later on November 24, 1993, the detective learned from hospital staff that Cardenas had been released two days earlier, on November 22, 1993. Hospital staff did not notify Seattle police before they released him. The detective searched for Cardenas but was unable to locate him.

On December 23, 1993, the State filed an information in King County Superior Court charging Cardenas with three counts of vehicular homicide based on driving while under the influence of alcohol and reckless driving, alternate prongs of the statute. On that day, a warrant was issued for his arrest. The warrant referenced a "Suspect Information Report" completed by the detective on November 29, 1993, that

stated,

> Suspect's true identity remains in question: two of the individuals riding in the suspect's vehicle were carrying fraudulent identification, including spurious state identification cards. The suspect was found to be carrying a health insurance card with what appears to be a fraudulent Social Security Number. Suspect is not a long term resident of King County and has no apparent ties to the community. A routine NCIC III check shows an individual with the same name and a markedly similar birthdate (02/24/72 versus 02/24/70) with felony narcotics convictions in Oregon. Request bail sufficient to allow booking for ID purposes.

Over 12 years later, on June 15, 2006, Cardenas was arrested in Yakima on the outstanding warrant. On June 22, 2006, Cardenas' attorney filed a notice of appearance. On June 26, 2006, he was arraigned and his attorney "note[d] an objection to the date of arraignment." He also filed a written objection to the arraignment on the ground that it fell outside the 14 day time limit in CrR 3.3. Neither the State nor the court addressed this objection, and Cardenas did not pursue it further.

Case scheduling was then set for July 10, 2006. On July 10, 2006, Cardenas agreed to a continuance of the case scheduling hearing, signed a written waiver of his CrR 3.3 right to a trial within 90 days and agreed that the new expiration date was October 29, 2006. He agreed to four more continuances, where he waived his CrR 3.3 speedy trial rights and agreed to a new speedy trial expiration date. The final continuance set the new expiration date as February 10, 2007.

Pretrial hearings began on January 16, 2007. At that time, the State amended the information to add an allegation of disregard for the safety of others. The jury found him guilty of all three counts under the "driving while under the influence" and

"disregard for the safety of others" prongs of the vehicular homicide statute. Because the prosecutor received many letters from the victims' families asking for leniency, the State recommended 41 months, the low end of the standard range. The trial court sentenced him to 41 months' confinement.

DISCUSSION

I. Sixth Amendment Right to Speedy Trial

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[1] The right to a speedy trial is triggered by filing charges or arresting the defendant, whichever comes first.[2] To determine whether a defendant's fundamental right to a speedy trial has been violated, courts consider four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant.[3] The primary burden is on the courts and the prosecutors to assure that cases are brought to trial.[4]

The first factor involves a threshold determination of whether the delay is sufficient to trigger judicial examination of the claim.[5] A delay long enough to be considered presumptively prejudicial triggers an inquiry into the remaining Barker factors.[6] The federal courts have held that generally postaccusation delay of more

[1] U.S. Const. amend. VI.
[2] State v. Iniguez, 143 Wn. App. 845, 855, 180 P.3d 855, review granted, 164 Wn.2d 1025 (2008).
[3] Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).
[4] Id. at 529.
[5] Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).
[6] Barker, 407 U.S. at 530.

than one year is "'presumptively prejudicial.'"[7]

The second factor, the reason for the delay, requires an inquiry into the government's efforts to pursue the defendant.[8] "The government has 'some obligation' to pursue a defendant and bring him to trial."[9] If the government pursues the defendant with reasonable diligence, the speedy trial claim fails unless the defendant can demonstrate specific prejudice.[10] But if the government is negligent in its pursuit of the defendant, prejudice is presumed.[11] Most federal courts, including the Ninth Circuit, have held that the prosecution bears the burden of explaining the delay.[12]

Cardenas contends that the extraordinary length of delay—13 years—is presumptively prejudicial, the record fails to establish that the State made any diligent efforts to secure his presence or notify him of the charges, and he asserted his speedy trial rights by noting his objection to the arraignment date in the trial court. Thus, he argues, all of the Barker factors weigh in his favor and require dismissal of the charges for violating his Sixth Amendment speedy trial right.

The State does not address the substantive merits of Cardenas' Sixth Amendment speedy trial claim but asserts that he is barred from raising this issue because he did not raise it below and fails to demonstrate that it is a manifest constitutional error warranting review. The State contends that he simply objected to

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[7] See Doggett, 505 U.S. at 652, n.1; United States v. Mendoza, 530 F.3d 758, 762 (9th Cir. 2008).

[8] Mendoza, 530 F.3d at 762-63.

[9] Id. (quoting United States v. Sandoval, 990 F.2d 481, 485 (9th Cir.), cert. denied, 510 U.S. 878 (1993)).

[10] Doggett, 505 U.S. at 656.

[11] Id. at 657.

[12] McNeely v. Blanas, 336 F.3d 822, 827 (9th Cir. 2003).

the date of arraignment under CrR 3.3, which is not the same as asserting a Sixth Amendment speedy trial violation. The State further argues that he fails to establish that his Sixth Amendment claim is a manifest error affecting a constitutional right because there is no factual record to support the claim.

Under RAP 2.5(a)(3) a claim of error may be raised for the first time on appeal if it is "manifest error affecting a constitutional right." But the defendant must show "how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review."[13] Thus, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."[14]

The time limits set forth under CrR 3.3 are procedural rules and do not create constitutional rights.[15] Thus, without more, Cardenas' CrR 3.3 objection cannot be automatically deemed a Sixth Amendment challenge to his speedy trial rights. He must therefore demonstrate that the Sixth Amendment violation claimed for the first time on appeal is a manifest error affecting a constitutional right. The State contends that he fails to do so because there is no record from which the Sixth Amendment violation can be established. We agree.

Because Cardenas only raised a CrR 3.3 objection to the arraignment date, neither the State nor the court developed a record to address a Sixth Amendment violation, which involves a different inquiry. A CrR 3.3 objection involves a determination of whether the defendant was arraigned and brought to trial within the

[13] State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citations omitted).
[14] Id. (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).
[15] State v. Mack, 89 Wn.2d 788, 791, 576 P.2d 44 (1978).

time periods provided by the rules. But as discussed above, evaluation of a Sixth Amendment speedy trial claim involves a four part factual inquiry into the reasons for the delay and resulting prejudice. Here, there was no such inquiry because the claim was not made.

While Cardenas is correct that the burden is on the State to establish the delay, the initial burden was on Cardenas to assert the claim. The court was not required to make this inquiry of the State when Cardenas did not raise the Sixth Amendment claim.[16] In the cases upon which Cardenas relies, Doggett v. United States[17] and United States v. Mendoza,[18] there was evidence before the trial court about the reasons for the delay.[19] But here, the record contains no evidence about the reasons for delay simply because the issue was not raised. Without giving the State a chance to present evidence, we cannot automatically presume that it had no justifiable reason for the delay and find a Sixth Amendment violation on that basis.[20] Thus, we cannot evaluate Cardenas' Sixth Amendment speedy trial claim.

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[16] Indeed, his later agreements to continue the trial date are further evidence that he waived any speedy trial claims, Sixth Amendment or otherwise.

[17] 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

[18] 530 F.3d 758 (9th Cir. 2008).

[19] In Doggett, the Court held that the evidence was sufficient to establish the government's "egregious persistence in failing to prosecute" where the defendant was indicted on drug charges in 1980 but was not arrested until 1988. 505 U.S. at 657. There, the trial court's findings were based on evidence about federal agents' attempts to locate him and their knowledge of his whereabouts. Id. at 649-50. In Mendoza, the Ninth Circuit held that the evidence did not support a finding that the government conducted a serious effort to find the defendant. There, the evidence before the court was that the defendant was in the Philippines when charges were filed and the government made no effort to contact him and inform him that he been indicted, despite knowing he was in the Philippines, having his relative's contact information in the Philippines, and having successfully contacted him there twice. 530 F.3d at 761, 764.

[20] While the detective did testify at trial that he made efforts to locate Cardenas, he did not discuss the extent of those efforts because they were irrelevant to the issues at trial.

II. CrR 3.3 Right to Speedy Trial

Cardenas argues in the alternative that the 13 year delay between charging and arraignment violated his right to a speedy trial under CrR 3.3. CrR 3.3 provides that an out of custody defendant must be brought to trial within 90 days of arraignment.[21] CrR 4.1 provides for when an out-of-custody defendant must be arraigned:

> The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay.[22]

As we recently made clear in State v. Rookhuyzen, "under the current criminal rules, there are no specific time limitations on when an out-of-custody defendant must first appear before the court."[23] Rather, "[i]t is only after a defendant's first appearance that the rules provide any basis to expect arraignment within a given time period."[24]

Before 2003, the rules did not specify a date by which out-of-custody defendant must be arraigned. But in State v. Striker[25] and State v. Greenwood,[26] the court imposed a constructive arraignment date of 14 days after the information is filed if there was an unnecessary delay in bringing the defendant before the court.[27] If the State acted in good faith and with due diligence to bring the defendant before the court or the defendant caused delay through fault or connivance, the delay was excluded

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[21] CrR 3.3(b)(2); CrR 3.3(c).
[22] CrR 4.1(a)(2)(2003).
[23] 148 Wn. App. 394, 397, 200 P.3d 258 (2009).
[24] Id. (emphasis omitted).
[25] 87 Wn.2d 870, 557 P.2d 847 (1976).
[26] 120 Wn.2d 585, 845 P.2d 971 (1993).
[27] Id. at 599-600.

from the speedy trial period.[28]

Cardenas contends that the pre-2003 version of CrR 3.3 and the Striker/Greenwood rule are controlling because he was charged in 1993. He acknowledges that a new criminal court rule applies to cases pending on its effective date, but contends that the interests of justice demand that the Striker/Greenwood rule apply here.[29] He notes that at the time of his arrest, he did not have the benefit of CrR 2.2(3)(i), which requires a database search for the defendant's current address before an arrest warrant can be issued, and contends that this rule was added to impose a due diligence requirement to the amended CrR 3.3.[30] Thus, he argues that the Striker/Greenwood rule should apply to impose this due diligence requirement. We disagree.

"A new criminal court rule applies to pending cases on its effective date, regardless of when the case began, unless in the court's opinion the former rule should apply in the interests of justice."[31] A new rule of criminal procedure applies to all cases pending on direct review or that are not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.[32] In State v. Olmos, the court held

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[28] Id. at 600-01.

[29] See CrR 1.3(b); State v. Olmos, 129 Wn. App. 750, 756-57, 120 P.3d 139 (2005).

[30] CrR 2.2(3)(i) provides:

> The court shall not issue a warrant unless it determines that the complainant has attempted to ascertain the defendant's current address by searching the following: (A) the District Court Information System database (DOSCOS), (B) the driver's license and identicard database maintained by the Department of License; and (C) the database maintained by the Department of Corrections listing persons incarcerated and under supervision. The court in its discretion may require that other databases be searched.

[31] Olmos, 129 Wn. App. at 756-57; CrR 1.3(b).

[32] Id. at 757 (citing State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627, cert. denied, 546 U.S. 983 (2005)).

that the amended speedy trial rules applied when an arrest warrant for the defendant was issued in 1991, but he did not appear before the court until 2003.[33]

In Rookhuyzen, we recently reiterated that the 2003 amendments eliminated the Striker/Greenwood rule and held that the new rules do not impose any specific time limitations on when an out-of-custody defendant must first appear in court.[34] We also agreed with Division Two's decision in State v. Castillo,[35] where the court acknowledged that "'the rule is lacking any vestige of good faith or due diligence,'" but that it did not prevent the court from considering the lack of good faith or due diligence on a constitutional speedy trial claim.[36] We further noted that in State v. George, the Washington State Supreme Court addressed a similar rule in the Criminal Rules of the Courts of Limited Jurisdiction (CrRLJ) and recognized that the pertinent time-for-trial rule "does not, by its plain language, require the State to demonstrate that it exercised good faith and due diligence in attempting to procure the defendant's presence at trial."[37] The court so held, even though CrRLJ contains a rule identical to CrR 2.2(3)(i) that requires a database search for the defendant's address before the court issues an arrest warrant.[38]

Thus, Cardenas fails to demonstrate that the new rules should not apply here. The case law is clear that the amended rules have superseded the Striker/Greenwood

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[33] 129 Wn. App. 750, 753-55, 120 P.3d 139 (2005); see also State v. Matlock, 27 Wn. App. 152, 157, 616 P.2d 684 (1990) (holding that current time for trial rule applied even though it was amended after the case commenced, concluding: "We do not believe the interests of justice would be served by adhering to former procedure where the amendment was addressed to an existing rule.").

[34] 148 Wn. App. at 397-98 (citing Olmos, 129 Wn. App. 750).

[35] 129 Wn. App. 828, 120 P.3d 137 (2005).

[36] 148 Wn. App. at 399 (quoting Castillo, 129 Wn. App. at 831-82).

[37] 160 Wn.2d 727, 738, 158 P.3d 1169 (2007) (addressing CrRLJ 3.3(c)(2)(ii)).

[38] CrRLJ 2.2(3)(i).

rule requiring due diligence, and there is no similar requirement under the current rules. Rather, due diligence is relevant only to a constitutional speedy trial claim which, as discussed above, was not properly raised here.

Applying the current rules, Cardenas fails to establish a time-for-trial violation. Here, Cardenas' first appearance was on June 22, 2006, and he was arraigned on that same date. Case scheduling was originally set for July 10, 2006, but he agreed to continue the hearing, waived the 90 day speedy trial period, and agreed to a new speedy trial expiration date of February 10, 2007. Trial began on January 16, 2007. The arraignment and trial date were therefore within the allowable time for trial established by the current time for trial rules.[39]

III. Statute of Limitations

Cardenas next contends the prosecution was barred by the statute of limitations. He argues that at the time he was charged, there was a three year statute of limitations for vehicular homicide and the State did not commence charges against him until he was actually notified of the charges in 2006. We disagree.

Here, the three year statute of limitations for vehicle homicide in effect in 1993 had run before the 1997 amendments changed the statute of limitations to allow for prosecution at any time. Thus, as the State concedes, the three year statute of limitations applies.[40] That statute provides that "prosecutions for criminal offenses shall

[39] We agree with the State that even if former CrR 3.3 applied, Cardenas waived his objection by later signing waivers of his right to a trial within the time specified by CrR 3.3.

[40] State v. Hodgson, 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987) ("When the Legislature extends a criminal statute of limitation, the new period of limitation applies to offenses not already time barred when the new enactment was adopted and became effective."), cert. denied, 485 U.S. 938 (1988).

not be commenced after the periods prescribed in this section."[41]

Cardenas contends that because "commenced" is not defined in the statute, we should construe it to mean when the defendant has received notice of the charges or the prosecution has exercised due diligence in attempting to provide notice, relying on case law from other jurisdictions. But as the State correctly responds, that is not the law in Washington. Rather, "'[i]n this state, criminal charges may be commenced against a defendant by one of four different procedures: (1) filing of an information by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing of a criminal complaint before a magistrate.'"[42] The State filed the original information on December 23, 1993, which was well within the three year statute of limitations.

IV. Timeliness of Amendment

Finally, Cardenas contends that the three year statute of limitations barred the State from amending the information in 2006 to add the allegation of reckless disregard for the safety of others, under an alternate prong of the vehicular homicide statute. He contends that because the late amendment broadened the original charges, it should not have been permitted. We disagree.

First, we note that Cardenas withdrew his objection to the amendment during pretrial hearings. While he initially objected to the timeliness of the amendment, he withdrew that objection, acknowledging that the State proposed it at an earlier date but withheld it pending plea negotiations. Nonetheless, his statute of limitations claim is

[41] Former RCW 9A.040.080 (1993).

[42] State v. Koch, 38 Wn. App. 457, 459, 685 P.2d 656 (1984) (citations omitted) (quoting State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971)).

without merit.

A court may permit a complaint to be amended "at any time before verdict or finding if substantial rights of the defendant are not prejudiced."[43] An amendment generally relates back to the timely filed complaint and is not barred by the statute of limitations "'[w]henever the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'"[44] But an amendment will not be permitted if it operates to "broaden or substantially amend the original charges."[45]

Here, the amendment added an allegation of disregard for the safety of others, an alternate means of committing the crime under the vehicular homicide statute. This allegation clearly arises out of the same transaction upon which the original information was based: the driving that caused the fatal car crash. Cardenas fails to explain how it impermissibly broadened the charges,[46] and as the State points out, no new or additional facts were added to the information. The amendment was therefore timely.

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[43] CrR 2.1(d); State v. Warren, 127 Wn. App. 893, 896, 112 P.3d 1284 (2005), review denied, 156 Wn.2d 1022 (2006).

[44] Warren, 127 Wn. App. at 896 (alterations in original) (quoting CR 15(c)).

[45] In re Thompson, 141 Wn.2d 712, 729, 10 P.3d 380 (2000); Warren, 127 Wn. App. at 896.

[46] He simply asserts that "the late amendment did broaden the original charges, so the convictions for vehicular homicide by disregard for the safety of others should be reversed and dismissed."

We affirm the judgment and sentence.

Ajid, J.

WE CONCUR:

Applewick, J.

Grosse, J.